

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-7083^S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-7083

FREQUENCY ELECTRONICS, INC.,
Plaintiff-Appellee

B

-against-

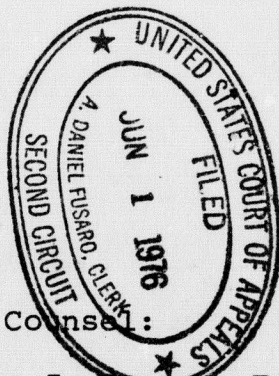
NATIONAL RADIO COMPANY, INC.,
Defendant

-and-

LOUIS LERNER
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT
OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT
LOUIS LERNER



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STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE DEFENDANT-APPELLANT
LOUIS LERNER

PRELIMINARY STATEMENT

This is a direct appeal from the final findings, conclusions and judgment rendered by the Honorable Charles L. Brieant, Jr., of the United States District Court of the Southern District of New York. Judge Brieant's decision is not reported. This case was originally commenced on January 24, 1972, in the Supreme Court of the State of New York and was removed to the U. S. District Court for the Southern District of New York pursuant to 28 U.S.C. §1446. The District Court and this Court have diversity

jurisdiction of this case pursuant to 28 U.S.C. §1332. The findings and conclusions of Judge Brieant were entered on December 9, 1975 and final judgment entered on January 20, 1976. Defendant-Appellant Louis Lerner ("Lerner") duly filed his Notice of Appeal on February 13, 1976. Plaintiff Frequency Electronics, Inc. ("Frequency") applied for and obtained a preliminary injunction in this case from Honorable Lloyd F. MacMahon pursuant to Opinion filed May 16, 1972 and reported at 342 F.Supp. 1159 (SDNY 1972). National Radio Company, Inc. ("National"), a Massachusetts corporation, was named as a defendant in the original case. National filed a petition for an arrangement under Chapter XI of the Bankruptcy Act on August 11, 1970. National was never served with process, has never filed an appearance and was never a party to this suit. National was adjudicated bankrupt on September 7, 1973 by the United States District Court for Massachusetts, Bankruptcy Docket No. 70-1006. Lerner's motion for change of venue, under 28 U.S.C. §1404, to the United States District Court for Massachusetts was denied by Judge McLean on April 25, 1972. Judge McLean's memorandum decision is not reported. Lerner filed a third-party complaint against National's patent attorney, Kenway, Jenney & Hildreth, of Boston, and on May 21, 1974 the third-party complaint was dismissed by Judge Brieant for lack of jurisdiction. This memorandum opinion of Judge Brieant is not reported.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Is Lerner a holder in due course of Frequency's Note?

2. Would the invalidity of one of nineteen patents, in a transaction involving the sale of data, patents, inventory, machinery, equipment and goodwill constitute failure of consideration?

3. Did National or Lerner make any representation or warranty of patent validity to Frequency separate and apart from the Purchase and Sale Agreement and the Assignment of patents; if so, are such statements integrated or merged in the Purchase and Sale Agreement or alternatively are such statements barred by the Massachusetts parol evidence rule?

4. Did the District Court commit reversible error in finding that paragraph 5 of the Purchase and Sale Agreement sets forth a warranty of patent validity under Massachusetts law?

5. Did the District Court commit reversible error in failing to find that the transfer of rights in and to nineteen patents was made by the document of assignment and that such assignment of "all right, title and interest" transferred no warranties whatsoever?

6. Did the District Court err in finding that oral statements made prior to the execution of a writing on matters contained in such writing constituted the basis for an action for deceit?

7. Did the District Court commit reversible error in finding that oral statements concerning patent validity were not statements of opinion, estimate or judgment and were actionable in deceit?

8. Should the findings of the District Court awarding to Frequency \$42,000 in damages against Lerner be set aside as clearly erroneous?

9. Does Frequency's claim for damages and rescission against Lerner survive the adjudication of National as a bankrupt?

10. Should the findings of fact made by the District Court be set aside as clearly erroneous and judgment entered for Lerner on the Note, or alternatively should this Court order a new trial?

STATEMENT OF THE NATURE OF THE CASE

Frequency brought action for declaratory judgment seeking to declare void its Note on the grounds of failure of consideration claiming that one of nineteen different patents purchased by Frequency from National was invalid. The nineteen different patents, data, inventory, machinery, equipment and goodwill, were purchased by Frequency on February 3, 1969 from National and consisted of all of the assets known as National's Atomichron line. The purchase of assets was made pursuant to a written Purchase and Sale Agreement which by its terms is governed under Massachusetts law. The transfer of patents to Frequency was by a document of assignment transferring to Frequency all of National's right, title and interest thereto. In April of 1970 defendant Lerner, a major stock holder of National, acquired plaintiff's Note from National. Lerner counterclaimed seeking enforcement of the Note. Frequency claims breach of warranty and misrepresentation and Lerner claims to be a holder in due course of the Note. The District Court found that there was failure of consideration and ordered rescission, allocated the purchase price among the assets and assessed damages against defendant Lerner in the amount of \$42,000.

STATEMENT OF FACTS

Early in November of 1968, following a telephone call from Martin Bloch ("Bloch"), president of Frequency Electronics, Inc., ("Frequency") to Frank F. Oddi ("Oddi"), president of

National Radio Company, Inc., ("National"), a meeting was held at National's plant in Melrose, Massachusetts, between representatives of Frequency and National (R.594). ^{1/} The meeting occurred in early November 1968 (R.301) and Mr. Bloch and Lazar met with Messrs. Oddi, Horner and others to discuss Bloch's interest in that part of National's business known as the "Atomichron".

Shortly thereafter, on Monday, November 25, 1968, Mr. Oddi met with Mr. Bloch at Frequency's headquarters on Long Island to discuss and reach tentative agreement on the terms of the sale of the Atomichron business by National to Frequency. Following further negotiations and telephone conferences during the period from November 29 through December 30, 1968, a letter of intent (Exhibit O, R.506) was prepared and signed by both parties under date of December 30, 1968.

On Wednesday, November 20, 1968, two business days prior to the meeting between Mr. Oddi and Mr. Bloch at the offices of Frequency on Long Island, New York, attorney Clarence Lyon one of National's patent lawyers and a member of the Boston patent law firm of Kenway, Jenney & Hildreth wrote to E. Whitney Drake, Esquire, house counsel for National. Mr. Lyon had for some years, since February 1958, been the

^{1/} Reference to the Record Appendix is made by use of the letter "R" followed by the page number of the Record Appendix.

principal patent attorney for National. In his transmittal letter of November 20, 1968, Lyon enclosed a copy of a preliminary memorandum prepared by his associate, attorney Henry D. Pahl, concerning the possible infringement of two of National's patents, the Zacharias and Mainberger patents, by a device manufactured by Hewlett-Packard ("H-P") of Palo Alto, California (Exhibits AD and 46, R.536 and 456, respectively).

The preliminary investigation by Lyon and Pahl was the result of a question raised by someone at National as to whether the H-P device constituted an infringement of any of National's patents (Lyon deposition, Exhibit AG, R.558, 560).

No action was commenced by National, no letter was written to H-P, and no in-depth investigation was made by Lyon or to his knowledge by anyone at the Boston patent law firm of Kenway, Jenney & Hildreth after writing the letter of November 20, 1968 until the summer of 1969 (R.490,567), when attorney Lyon was retained by Frequency. No one from Frequency requested him or anyone in his law firm to make any investigation or render any opinion as to the validity of any of the Atomichron patents at any time prior to the closing of February 3, 1969. No one from Frequency made any inquiry about the preliminary memorandum of November 10, 1968 at any time prior to the closing (R.562).

In early January, 1969, after the execution of the Letter of Agreement (Exhibit O, R.506), Drake commenced the drafting

of the purchase and sale agreement. The first draft dated January 8, 1969 was distributed to interested persons at National, outside counsel for National, and attorney Kent M. Klineman, an officer of Frequency and a partner in the law firm now known as Pryor, Cashman and Sherman, counsel to Frequency (R.643, 663). Following the review by all persons of the preliminary draft, a final document was prepared and on Monday, February 3, 1969, the closing took place in New York City in Klineman's office. At the closing representing National were Drake and Horner. (Drake Deposition Exhibit AK p.77).

At the closing on February 3, 1969, National and Frequency executed the Purchase and Sale Agreement (the "Purchase Agreement", Exhibit 1, R.12), pursuant to which National sold its Atomichron business to Frequency and transferred:

- (i) items of inventory, machinery and data;
- (ii) nineteen patents, and
- (iii) the trademark "Atomichron".

Frequency agreed to pay for the purchase of the Atomichron business by making payment to National as follows:

- (i) \$733,000 in cash and notes;
- (ii) assumption of liability under certain contracts, including the July 1, 1954, Zacharias agreement;
- (iii) 5% royalty for ten years, and
- (iv) equal participation in the net recovery, if any, from any causes of action for patent infringement which Frequency might choose to pursue at its own risk (§8 of the Agreement, R.16).

At the closing Frequency received from National documents transferring National's rights in and to the assets to be conveyed, the patents Exhibit 9 (R.446), the machinery, inventory and equipment, Exhibit 10 (R.448), and the trademark, Exhibit 81 (R.474).

Frequency paid the purchase price of \$733,000 as follows:

- (i) \$208,000 in cash,
- (ii) \$200,000 by non-interest bearing note, due August 3, 1970, and
- (iii) \$325,000 by non-interest bearing note, due February 3, 1979, payable in installments of \$32,500 each, commencing February 3, 1970, and annually on each February 3, thereafter.

On June 27, 1969, Frequency and National entered into a further agreement (the "June Agreement", Exhibit N R.504), by which the principal due on the \$325,000 Note was reduced by \$23,000. The reduction was made in the form of a "credit" against the \$32,500 annual installment payments due on February 3, 1970 and February 3, 1971, in the amounts of \$2,500 and \$20,500 respectively (R.504). At that time the balance due on the \$325,000 Note was \$272,000 (R.332) National having been paid the \$30,000 installment payment due February 3, 1970 (R.473, 517). To date Lerner has been paid only \$12,000 on the Note (R.510).

On April 9, 1970, National negotiated to Lerner (R.93) the \$325,000 Note and the \$200,000 Note, for \$323,000 in cash. National retained certain royalty rights under the Agreement, (R.14) and rights to participate in proceeds

from actions for patent infringement brought at Frequency's own risk (R.16).

In the summer of 1969, (R.489), Frequency retained Clarence S. Lyon, National's patent counsel, to make a "cease and desist" demand and a claim of patent infringement against H-P. Under date of June 19, 1970, Lyon, acting for Frequency (R.492), took the first step in litigation by writing to H-P (R.543), and demanding that H-P cease infringing the Mainberger and Zacharias patents. When Lerner acquired the two notes of Frequency, in April, 1970, and when Lyon first wrote to H-P in the summer of 1970, neither Lyon nor Lerner or anyone at National knew or had any knowledge of any defect or claim of defect in and to any of the nineteen patents.

Lyon continued working for Frequency through the summer of 1971. Under date of March 17, 1971, he submitted to Frequency a memorandum on Frequency's claim against H-P (Exhibit Y, R.524). The Lyon memorandum of March 17, 1971, concluded among other things that the Mainberger patent was valid and infringed by H-P model 5050A (R.529) and that other Atomichron patents might also be infringed. The Memorandum also stated that based upon certain facts assumed in the memorandum the Zacharias patent would be held to be invalid.

Lerner first learned that a claim had been made by Frequency that the Zacharias patent was invalid and that the Note he held was claimed to be void only upon the commencement of this suit (R.343).

SUMMARY OF ARGUMENT

Massachusetts law applies to this case.

The Court below was wrong in failing to hold that Lerner is a holder in due course because he purchased Frequency's Note from National for value and without actual knowledge of the invalidity of the Zacharias patent.

Even if Lerner is not a holder in due course he should prevail because the District Court incorrectly interpreted the law and should be reversed, on the following grounds:

1. Evidence concerning the importance of the Zacharias patent, the representations of patent validity, and the claim against Hewlett-Packard for infringement should be stricken from the Record because it is barred by the Parol Evidence Rule.
2. The Court's finding of breach of warranty and deceit is based upon evidence which cannot be considered under the Parol Evidence Rule.
3. Even if such evidence could be considered by the Court the decision is wrong because,
 - (a) the quit-claim assignment of patents carried with it no warranty of title, and
 - (b) a statement by a layman concerning patent validity is a statement of opinion and not actionable in deceit.

1. THE DISTRICT COURT WAS IN ERROR WHEN IT FOUND THAT
LERNER WAS NOT A HOLDER IN DUE COURSE OF FREQUENCY'S NOTE.

The District Court was in error in interpreting Massachusetts law in its holding that Lerner was not a holder in due course of Frequency's \$325,000 note (the "Note") which was negotiated to him in April 1970. The Court found that in the spring of 1970 Lerner purchased from National two non-interest bearing notes of Frequency. Both of these notes had been issued by Frequency to National on February 3, 1969 as part of the purchase price for National's Atomichron business. One of the non-interest bearing notes (R.28) was in the face amount of \$200,000 and the other (R.30 and 509) in the face amount of \$325,000. When Lerner acquired the Note in April, the unpaid balance due was \$270,000 (R.90, 332). The Court did not dispute that Lerner was a holder of the Note, as defined by UCC §1-201(20), nor that he took the Note for value and in good faith, UCC §1-201(19). (R.93). The Court stated: "Lerner has not sustained his burden of showing that he had no notice of the defense of failure of consideration at the time the Note was negotiated to him in April, 1970" citing UCC §1-201(25). (R.93). The Court did not find that Lerner had actual subjective knowledge of the invalidity of the Zacharias patent, but that he had such knowledge of related circumstances as to be objectively chargeable with knowledge of facts from which a person trained in patent law might conclude that the Zacharias patent was invalid. In the language of the Court:

"He had knowledge of both the circumstances surrounding the origins of the Zacharias patent and National's activities related to it, sufficient to put on him a duty to inquire further. He is thus chargeable with knowledge of all the facts which such an inquiry would have revealed." (R.94).

Thus, the Court found Lerner to be objectively chargeable with notice of a defense against the Note, on the grounds that Lerner was negligent in discharging a duty to inquire whether or not the Zacharias invention (or the inventions claimed in the other 18 patents) had been offered for sale because of the show at the Overseas Press Club on October 3, 1956 and whether the application had been timely filed.

Massachusetts law does not impose upon a holder in due course such an objective standard of knowledge nor such a duty to inquire whether or not a defense exists against a negotiable instrument. To impose such a standard and duty upon a holder in due course is contrary to the approach adopted by the Uniform Commercial Code in defining "good faith" as "honesty in fact" (Mass. G.L. c.106, §1-201(19)), and "knowledge" as "actual knowledge . . . [i.e.] knowledge rather than . . . reason to know" (Mass. G.L. c.106, §1-201(25)). The holding of the District Court is contrary to the well-established intention of the draftsmen of the Code to reject the objective standard of good faith and knowledge and adopt the subjective standard. White and Summers, Handbook of the Law Under the Uniform Commercial Code 471-472 (1972). The law of Massachusetts has followed closely the standards set forth in the Code, as stated in the opinion of Circuit Judge Coffin in Bowling Green, Inc. v. State Street

Bank and Trust Company, 425 F.2d 81, 85 (1st Cir. 1970):

"[T]he Code defines 'good faith' as 'honesty in fact' . . . an essentially subjective test which focuses on the state of mind of the person in question. The Code's definition of 'notice' . . . also focuses on the actual knowledge of the individual allegedly notified . . . Massachusetts continues to look to the facts of the individual case rather than applying an 'objective standard' based on the general business dealings between the transferor and the transferee of an instrument." Citing Universal CIT Credit Corp. v. Ingel, 347 Mass. 119(1964).

This rule of subjective intent in good faith has been more recently reaffirmed by the Massachusetts Supreme Judicial Court in the case, Industrial National Bank of Rhode Island v. Leo's Used Car Exchange, Inc., 362 Mass. 797, 801, as follows:

"'Good faith' as used in G.L. c. 106, §3-302 (1)(b), is defined in G.L. c. 106, §1-201(19), as 'honesty in fact in the conduct or transaction concerned.' G.L. c. 106, §3-102(4). Nothing in the definition suggests that in addition to being honest, the holder must exercise due care to be in good faith. . . . This conclusion, which is so clear from the Uniform Commercial Code itself, is supported by the legislative history of §3-302(1)(b). . . . Our conclusion is also supported by the pre-code case of Macklin v. Macklin, 315 Mass. 451, 455, where we said, 'The rights of a holder of a negotiable instrument are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence.'"

The Court went on to say:

"This is not to say that negligence has no role in the determination of a holder's status as a holder in due course under Section 3-302. But negligence goes to the notice requirement of Section 3-302(1)(c) as defined by Section 3-304, and Section 1-201(25). See also Section 3-406. Since the District Court Judge found that the plaintiff had no notice of dishonor, defense or claim, and the evidence

before this finding, the defendant's argument that the plaintiff failed to exercise due care is inapposite."

The case of Leo's Used Car Exchange, supra, involved action by the plaintiff-bank to recover on two checks drawn by the defendant, payment of which had been stopped after said bank had accepted the checks and paid cash to the payee. Evidence had been presented that the teller had cashed both checks without first obtaining the approval of the bank manager in accordance with the customary procedure of the bank. The defendant argued that the bank thereby failed to exercise ordinary care. The Supreme Judicial Court, reversing the lower court, held that the failure to obtain approval of the bank manager did not constitute evidence to support a finding of lack of good faith, at p. 801, nor evidence to support a finding of notice of dishonor, defense or claim against the instruments, at p. 802. The fact that the holder did not take all necessary steps --- indeed, in that case even all customary steps --- to verify the soundness of the instrument before accepting and making payment thereof, did not constitute evidence of bad faith or actual knowledge of a defense or claim.

In the instant case, a more tenuous reasoning than that argued by the defendant in the above case is required to reach the holding of constructive knowledge of a defense on the basis of the record in the case. Lerner is entitled to rely upon the advice of patent counsel. At the time that Lerner purchased the Note from National in April of 1970, neither National, Lerner

nor anyone at Frequency, nor National's patent attorneys, Kenway, Jenney & Hildreth, had any knowledge of the invalidity of the Zacharias, or any of the other 18 patents assigned to Frequency as part of the Atomichron business. The knowledge which the District Court has attributed to Lerner and which, according to the District Court (R.94) defeats Lerner's claim that he is a holder in due course is knowledge of the invalidity of one of the 19 patents transferred on February 3, 1969. A determination of whether a particular patent is valid or invalid calls for the opinion of counsel specialized in the patent field, notwithstanding the statutory presumption of validity. 35 U.S.C. §282. Clearly the Pahl memorandum of November 14, 1968 (Exhibit 46, R.456), and the demand letter of Lyon to Hewlett-Packard dated June 19, 1970 (Exhibit AI, R.543) established the fact that in April of 1970 no one at Frequency or National knew, nor did Lerner know, of the invalidity of the Zacharias patent. Accordingly, there was then no fact or circumstances of which Lerner had actual knowledge, nor fact or circumstance with which Lerner is charged which would put Lerner on actual notice of the invalidity of any of the Atomichron patents. The District Court is in error when it holds that facts received by Lerner in 1956, at the press conference, coupled with the claimed late filing in 1957 of the Zacharias patent application (R.466) - notwithstanding the statutory presumption of patent validity, the oath of each of the three inventors (R.463, 464 & 465) and the response of the patent lawyers (R.468), are sufficient to defeat Lerner's claim that

he is a holder in due course.

To arrive at the District Court's ruling that Lerner took the notes with notice of a defense to the enforcement thereof, the District Court had to misconstrue the language of Mass. G.L. c.106, §1-201(25)(c) and add to the language of the definition of notice a duty to inquire and negate the subjective act of reason. Under existing Massachusetts law, a holder of a negotiable instrument has notice of a defense against enforcement of the note only when "from all the facts and circumstances known to him . . . he has reason to know that [a defense] exists."^{2/}

^{2/} Massachusetts law is in accord with the general construction of UCC 1-201(25) by other jurisdictions. The Missouri Court of Appeals recently stated the meaning of §1-201(25) as follows:

"This section is declaratory of established Missouri law that nothing short of actual knowledge or bad faith will defeat the title of a holder in due course, although actual knowledge may be inferred from the fact and circumstances surrounding acquisition of the instrument, but not from circumstances which would merely put a reasonable prudent person on inquiry." Mid-Continent National Bank v. Bank of Independence, 16 UCC Rep. 1286, 1291 (1975).

The United States District Court for the Eastern District of Pennsylvania has construed §1-201(25) under Pennsylvania law as follows:

"[W]ith negotiable instruments the test is not care, but good faith. To defeat the rights of of one dealing in negotiable securities, it is not enough to show that he took them under circumstances which ought to excite the suspicion

In some jurisdictions, the Code's standards of subjective good faith and actual knowledge have been modified in certain consumer credit transactions involving lenders closely related to vendors, but the present case does not involve a consumer

of a prudent man and cause him to make inquiry, but that he had actual knowledge of an infirmity or defect, or of such facts that his failure to make further inquiry would indicate a deliberate desire on his part to evade knowledge because of a belief or fear that investigation would disclose a vice in the transaction." Colin v. Central Penn National Bank, 18 UCC Rep. 188, 194(1975), emphasis original; quoting First National Bank v. Goldberg, 340 Pa. 337 (1974).

The Tennessee Supreme Court has defined notice as follows:

"The holder's rights cannot be defeated without proof of actual notice of the defect in title or bad faith on his part, evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he has acted in mala fide, his title according to settled doctrine will prevail." McConnico v. Third National Bank, 499 SW2d 874, 882 (1973).

Following the Tennessee rule, the United States District Court for the Middle District of Tennessee stated that "the law imposes no affirmative duty upon the transferee of negotiable paper to make an inquiry as to possible defenses" Third National Bank in Nashville v. Hardi-Gardens Supply of Illinois, Inc., 15 UCC Rep. 853, 866 (1974).

The Texas Court of Civil Appeals recently stated:

"The test for 'good faith' under the Texas Business and Commerce Code is not diligence or negligence; and it is immaterial that appellee may have had notice of such facts as would put a reasonably prudent person on inquiry which would lead to discovery, unless appellee had actual knowledge of facts and circumstances that amounted to bad faith." Richardson Co. v. First National Bank in Dallas." 504 SW2d 812, 14 UCC Rep. 443, 448 (1974).

credit transaction. Moreover, as observed by Circuit Court Judge Coffin, it is doubtful that the modified rule of such cases has been accepted as law in Massachusetts, Bowling Green, Inc., supra at 85

The only context in which the Code explicitly imposes upon a holder a duty of due diligence to inquire into possible defenses of which he has no actual knowledge nor actual reason to know is the context in which the holder is an organization and actual knowledge of a defense or claim may be in the possession of the organization although the individual conducting the transaction of taking an instrument may be ignorant of such. Section 1-201(27) states:

"Notice, knowledge of a notice or notification received by an organization is effective for a particular transaction from the time that it is brought to the attention of an individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routine. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information."

The rule of §1-201(27) is inapplicable to the present case, since Lerner took the note as an individual and not as an organization. In any case, however, the rule of §1-201(27) does not modify the Code's standard of actual knowledge but speaks of circumstances in which actual knowledge of a defense

or claim is possessed by an organization although the individual conducting the transaction may be ignorant of it. The District Court below requires even more - that Lerner retain counsel to advise him on patent law, as a layman's opinion on the validity of a patent is worthless.

The rule of §1-201(27) has been recently interpreted under Massachusetts law in the case of Morgan Guaranty Trust Co. of New York v. Third National Bank of Hampden County, 400 F.Supp. 383 (D.Mass. 1975), aff'd ____ F.2d ____, 18 UCC Rep.483 (1st Cir.1976). In that case, the defendant had accepted as security for cash loans two U. S. Treasury Bills, and only subsequent to the transaction did the individuals who approved the loan and acceptance of the Treasury Bills discover that the pledged T-bills were listed in the "notices of lost securities" in the stolen securities file maintained by other individuals in the bank. The Court held that the defendant bank had actual notice of the claim against the instruments and that the bank failed to exercise due diligence to communicate such actual knowledge within the organization. The Circuit Court specifically noted that this decision under §1-201(27) did not modify the rule it had announded in Bowling Green, Inc., supra, and stated as follows:

"Bowling Green, Inc., v. State Street Bank and Trust Company, 425 F.2d 81, 85 (1st Cir. 1970), is not inconsistent with our holding today. In Bowling Green we stated that whether an individual has received notice

within the meaning of §1-201(25) depends largely upon the actual knowledge of the individual. Here there is no question but that Third Bank received notice within the meaning of §1-201(25). The objective test of §1-201(27) applies only after it has been determined that the organization received notice." (at 488, n.6)

The proper test to determine if Lerner had notice is whether Lerner had actual knowledge of the invalidity of the Zacharias patent when the Frequency notes were negotiated to him. The record is clear, no one - Lerner, Lyon or Bloch (R.524, 533) had actual knowledge of the invalidity of the Zacharias patent in February of 1969 or in April of 1970. The law imposed no duty upon Lerner to inquire into possible defenses beyond the knowledge which would arise from facts coming to Lerner - - as a businessman but not a patent attorney nor electronics engineer. Certainly, as a matter of logic, Lerner would not have purchased the Frequency notes in April, 1970 had he known of a defense to their enforceability.

As a holder in due course Lerner took the Note subject only to the "real defenses" (infancy, duress, fraud in the essence, etc.) but free of all "personal defenses" (lack of consideration, breach of warranty, fraud in the inducement, etc.) "of any party to the instrument with whom the holder has not dealt." UCC §3-305. The defenses here asserted by Frequency are clearly personal defenses of which a holder in due course takes free.

The proviso of §3-305 that a holder in due course takes free of defenses "of any party to the instrument with whom the holder has not dealt" was designed to prevent an original party to the instrument from insulating himself by means of multiple transfers from defenses later revealed, and is not applicable to persons not parties to the prior transaction, even though they were indirectly involved therein. Saale v. Interstate Steel Co., Inc., 27 App. Div. 2d 1, 275 N.Y.S. 2d 532 (1966); and Bailey v. Polster, 468 S.W. 2d 105, (Tex. Civ. App. 1971). Lerner was not an original party to the instrument and thus is free of the personal defenses asserted by Frequency.

Having purchased the Note for value, in good faith, and without knowledge of any claim or defect, Lerner became a holder in due course and is entitled to payment thereof.

2. THE DISTRICT COURT WAS IN ERROR WHEN IT HELD THAT
LERNER WAS NOT AN ASSIGNEE FOR VALUE WITHOUT NOTICE AND
COULD NOT ENFORCE THE NOTE AGAINST FREQUENCY.

At page 8 of the District Court's opinion Judge
Brieant said:

"The evidence cited above also negates
Lerner's claim that he is an assignee for
value without notice." (R.94).

With these brief words and without specific findings
of fact or conclusions of law the District Court dismissed
Lerner's contention that he was an assignee for value without
notice. Even if Lerner must contend with the personal
defenses asserted by Frequency and face directly the claim
that the Note is void for failure of consideration, Lerner
should prevail.

The Note was part of the total purchase price paid for
the Atomichron business purchased by Frequency. The weight
of the evidence at trial cannot support the findings of the
trial judge that the Zacharias patent alone was the sole
reason for the transaction. Under Massachusetts law the
invalidity of one of nineteen patents constituting a portion
of the assets transferred does not amount to a failure of
consideration.

The instrument transferring National's rights in the
patents, the assignment, plaintiff's Exhibit 9, R.446,
transferred to Frequency only " . . . all right, title
and interest in and to the patents and inventions claimed
therein . . . " (R.446).

The words "all right, title and interest" have a particular meaning in the common law and the law of Massachusetts. Such language transfers only such rights or interests, however great or small, as the assignor may have. Such transfer, grant or conveyance is sometimes referred to as a "quit-claim" transfer and carries with it no warranties whatsoever.

The transfer of patent rights to Frequency was by the document of assignment (R.446). The form of document was known and acceptable to Frequency because it was attached as Exhibit "F" to the Purchase and Sale Agreement (R.33). Frequency can claim no surprise to the quit-claim transfer.

Indeed the specific language of the Purchase and Sale Agreement under the general heading "title to be conveyed" states:

"Patents shall be conveyed by assignment in the form hereto attached as Exhibit 'F'." (R.14).

The District Court failed to refer to the document of transfer and erroneously referred to the Agreement to find a warranty of patent validity. This is an error in construction.

The Court was also wrong when it found a warranty of "good" title (R.92) in that part of the Agreement relating to the quantum i.e. "full", of title (R.14) to be conveyed. National's title was not to be diminished by joint interests, encumbrances, licenses, attachments, etc. As a matter of construction the Court can look only to the document of assignment to determine what warranties, if any, were made. There was no variance with the form agreed upon by the parties and the performance, i.e. the execution and

delivery of the Assignment, was in satisfaction of the terms of the Agreement.

The language "all right, title and interest" contained in the granting clause of the Assignment carries with it no warranty whatsoever. This language was considered by the Massachusetts Court in the early case of Sears v. Leland, 145 Mass. 277(1877). In that case the defendant assigned all her right, title and interest in a mortgage which later was found to be invalid. The plaintiff sought recovery of the amount paid plus expenses. The Court denied recovery and stated at p.278:

"The plaintiff obtained from the defendant an assignment of all her interest in the mortgaged property, but there was no warranty, and the words chosen were apt to express a conveyance of such right, title, and interest, if any, as she might have. Where the subject of a contract has no existence, as where two parties contract as to the sale of a horse, which, without the knowledge of either, is dead, the contract may indeed be rescinded. But this principle has no application where one voluntarily purchases such right, title, or interest in property as another may have, even if both parties are in error as to the extent or value of that title or interest, or even if in fact the seller has no right. The subject of the contract is such right, title, or interest as may exist."

In this case the patents were assigned by a conveyance of such right, title and interest, if any, as National had but there was no warranty.

In United Sugar Company v. Guaranty Trust Company, 254 Mass.292(1926) the Supreme Judicial Court again construed the words "all the right, title and interest" and

at p.294 stated:

"While the agreement to purchase, if read in the light of subsequent developments shown by the bill of particulars, that made the foreclosure invalid, may have been improvident, the words, 'all the right, title and interest,' embraced only what the defendant could lawfully claim under the foreclosure, and do not import even an implied warranty of ownership in the property as described in the contract." (cases cited).

The Court below cites and relies upon the opinion of Judge MacMahon, reported at 342 F.Supp. 1159 (SDNY 1972). Judge MacMahon's opinion is grounded upon one case - Nash v. Lull, 102 Mass.60(1869). That case involved the making and delivery of a note for the consideration of a license from the patentees of a certain invention. The language of the license and the representations made at the time the note was made and delivered carried with it a warranty of patent validity. In Nash v. Lull, supra, the bargain was for a patent license and involved one patent.

Judge MacMahon and Judge Brieant are in error because the transfer of rights in Nash v. Lull, supra, was a license which carried with it an implied warranty of patent validity. These are not the facts in the transfer from National to Frequency of rights in patent by a quit-claim assignment.

In Gilmore v. Aiken, 118 Mass.94(1875) ^{3/} the plaintiff brought an action of contract on two promissory notes

^{3/} Although Gilmore v. Aiken, supra, was cited to the trial Court in defendant's post trial memorandum

made by the defendants. The consideration for the notes was the sale and assignment by the plaintiff to the defendants of his interest in three patents. The instrument of assignment, set forth in the margin of the report of the case at p.95, transferred to the defendants " . . . all the right, title and interest I have in and to the following described patents . . . " Counsel for the defendants cited Nash v. Lull, supra, in support of the contention that the notes were void for failure of consideration because one of the three patents was void, not having been duly granted and issued, according to law.

Judge Gray, who some six years earlier had written the opinion in Nash v. Lull, supra, stated in Gilmore v. Aiken, supra, at p.97, as follows:

"The extent of the interest undertaken to be conveyed by the plaintiff to the defendants, and of the obligation on esstoppel created by such conveyance, depends upon the terms of the written instrument of assignment executed by him to them.

it is surprising that the trial Court totally ignored the case. Gilmore v. Aiken a copy of which is annexed hereto as an exhibit to this brief clearly sets forth the Massachusetts law and although counsel for the defendants Gilmore case cited Nash v. Lull, supra, Chief Justice Gray speaking for the Gilmore Court did not overrule or distinguish Nash v. Lull because it had no application to the facts in the Gilmore case. Nash v. Lull, supra, has no application to the facts in this case as Nash deals with a license which carries with it an implied warranty of patent validity whereas Gilmore and the case before this Court deal with the transfer by quit-claim of the right, title and interest in and to the described patents.

By that instrument, he sells, assigns and transfers to them only the right, title and interest which he has in three patents The assignment is in the nature of a quit-claim deed of whatever right, title or interest the plaintiff has or may acquire in the patents specified, and creates no warranty that either of the patents was valid."

Judgment was rendered for the plaintiff on the notes in Gilmore v. Aiken, supra, just as this Court should reverse the District Court and enter judgment in favor of Lerner on the counterclaim.

Even if Lerner were not a holder in due course, the language of the patent assignment, viz., "all its right, title and interest", constitutes a quit-claim assignment by which National transferred to Frequency only whatever rights it had in and to the patent, and the invalidity of the Zacharias patent does not constitute a failure of consideration. Accordingly, Lerner as an assignee for value without notice is entitled to enforce the \$325,000 Note against Frequency. A quit-claim grant carries with it no implied representation of warranty or ownership or title to the property so transferred, and in no way constitutes an expressed or implied representation of the validity of patent rights assigned under a quit-claim assignment. Gilmore v. Aiken, 118 Mass.94(1875); Sears v. Leland, 145 Mass.277(1877); First National Bank v. Massachusetts Loan and Trust Co., 123 Mass.330(1877). The words "all right, title and interest" embrace only what the grantor could lawfully claim and do not import even an implied warranty of ownership in the

property described in the contract. United Sugar Company v. Guaranty Trust Company, 254 Mass.292, 294(1926).

The common form of patent assignments is quit-claim.

"An assignment of a patent need not be in writing at all, as between the parties; but if it is, the common form contains no covenants or warranty. It sells and assigns 'all my right, title and interest in and to the said invention and patent.' There is close analogy to a quit-claim; . . . "Westinghouse Electric Mfg. Co. v. Formica Insulation Co., 288 F.330, 333 (6th Cir.1923).

Under Massachusetts law, a quit-claim assignment conveys only that interest which the grantor possesses. Baker v. Davie, 211 Mass.429, 439(1912).

There is no implied warranty of title or patent validity in a quit-claim assignment of patent. All Steel Engines v. Taylor Engines, 88 F.Supp.745 (N.D.Cal.1950) aff'd 192 F.2d 171 (9th Cir. 1951).

As stated in Rosenberg Patent Law Fundamentals, page 272 (1975):

"In the absence of an express provision to the contrary, the patentee, in merely giving a license or making an assignment, does not warrant that the patent or patents being licensed or assigned are valid or even that the inventions claimed therein are operable. Moreover, there is no implied warranty that the licenses or assignee will be able to exploit the invention covered by the claims of the licensed or assigned patent without infringing the claims of some other patent having claims which dominate those of the patents which are the subject of the license or assignment."

Where there is no express warranty of patent validity, none will be implied.

Lerner, even if this Court does not find that he is a holder in due course, succeeded to the interests of National as an assignee for value, and can assert the promissory note against Frequency, because there is no failure of consideration and no breach of warranty of patent validity.

3. EVEN IF THE LANGUAGE OF THE AGREEMENT OR THE PATENT ASSIGNMENT AMOUNTED TO A REPRESENTATION OF PATENT VALIDITY, THE DISTRICT COURT WAS WRONG NOT TO HOLD THAT THE NOTES ARE ENFORCEABLE BECAUSE THE LAW WILL NOT INQUIRE INTO THE ADEQUACY OF CONSIDERATION.

Frequency purchased the Atomichron business from National which included nineteen patents, numerous items of inventory, machinery, equipment, goodwill, and a trademark. Assuming the invalidity of the Zacharias patent all of the other eighteen patents, inventory, machinery, and equipment were useful and of value. The invalidity of one of nineteen patents does not constitute a failure of consideration nor such partial failure of consideration as to upset the transaction and render void the Note issued as part of the payment for such assets.

Where a written contract has been entered into by parties of equal business sophistication, equally capable of fending for themselves, the law does not favor attempts to set the bargain aside or reshape it with the benefit of hindsight. The District Court should have declined to

participate in an investigation to determine the adequacy of consideration.

"It is an 'elementary principle that the law will not enter into an inquiry as to the adequacy of the consideration.' This rule is almost as old as the law of consideration itself. Therefore, anything which fulfills the requirements of consideration will support a promise whatever may be the comparative value of the consideration, and of the thing promised." Williston on Contracts, 3d Ed., §115 (citations omitted).

The subsidiary rule follows that where there is partial failure of consideration, "if there is a substantial consideration left it will be sufficient to sustain the contract." 17 C.J.S. §130. In the words of the Restatement of Contracts §84, "Consideration is not insufficient because of the fact . . . (b) that part of it does not comply with the requirements of sufficiency . . ."

"A partial failure of consideration does not excuse performance by the other party to a contract or give him a right of rescission . . . '[A]lthough part of the consideration is insufficient consideration, a contract may be supported by the residue of the consideration if good per se.'" United States v. Schaeffer, 319 F.2d 907, 911 (9th Cir.1963).

In the case of a partial failure of consideration, the general rule is that the contract will not be apportioned by the Court, except where on the terms of the contract, there are distinct and independent considerations going to distinct parts of the contract. 17 Am.Jur.2d 445.

The trial Court stated at page 15 of its opinion (R.101) that " . . . the plaintiff has not provided the

Court with any basis for allocating the \$325,000 total consideration for data and patents among the Zacharias patent, the eighteen other patents, and the data transferred." The attempt by the trial Court to make such allocation without testimony or adequate evidence was error.

In the case of Leonard v. Draper, 187 Mass.536(1905), where a promissory note was given for stock, the Court said at p.538:

"The stock was property, and it was then supposed to be of value. The mere fact that subsequently it proved to be worthless does not affect the validity of the note."

Moreover, a presumption of sufficient consideration follows from the respect the law accords to formally executed contracts. The burden of proof regarding any inadequacy or failure of consideration is upon the party raising the challenge:

"The law . . . attributes so much force and effect to the formal written contract, and to the words 'value received,' as to presume, in the absence of proof, that there was a valuable consideration for the promise; and if the promisor would avail himself of the defense, that it was without consideration, it lays the burden of proof upon him, satisfactorily to show that." C.J. Shaw in Parish v. Stone, 31 Mass.198, 201(1833).

In the present case, Frequency did not meet this burden of proof. There was no testimony on value and no cross-examination of witnesses. There is no basis for the allocation made by the Court and such findings were and are clearly erroneous.

In Rip Van Winkle Wall Bed Co. v. Homes, ____ Cal. ____ ,
14 P.2d 754 (1932) the California Court at p. 755 held that
even if a partial failure of consideration were assumed, such
partial failure would be immaterial ". . . since the contract. . .
provides one purchase price payable in installments for the
purchase of a number of things."

Similarly, here there is no failure of consideration.
The trial Court set forth no rational basis for the allocation
of the purchase price. There was no partial failure of consid-
eration, for the contract provided only a single purchase price
payable in installments.

The plaintiff failed to sustain its burden of proof to
"establish" a defense necessary to show partial failure of
consideration. Mass. G.L.c.106 §3-408, §3-307(2), §1-201(8).

Accordingly, this Court should rule that the allocation
made by the trial Court was in error, the trial Court should
be reversed and judgment entered in favor of Lerner on the
First or Second Counterclaims (R.64, 65) plus interest, attor-
neys fees and costs.

4. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR WHEN
IT BASED ITS DECISION UPON TESTIMONY WHICH THE TRIAL
COURT COULD NOT CONSIDER UNDER THE PAROL EVIDENCE RULE.

The transaction between National and Frequency was finally formulated and settled by the Letter Agreement of December 30, 1968. (Exhibit O. R.506). This Letter Agreement was signed by Oddi, National's president, and by Lazar, Frequency's vice president, following a meeting between Oddi and Bloch on November 25, 1968 and phone conversations on November 29 and 30 then followed the negotiations and execution of the Purchase and Sale Agreement, dated February 3, 1969 (Exhibit 1, R.12) and the closing and exchange of the cash and notes for the documents of transfer, (Exhibits 9, 10, 81, R.446, 448, 474) and subsequently the delivery of the assets.

The Agreement was the final written expression of the deal and included an integration clause at paragraph 15 (R.18) which reads:

"Parol Evidence. This agreement supersedes all prior understandings of the parties, and may not be modified or amended in any respect except by an instrument in writing, executed subsequent to the date hereof, signed in behalf of NRCI by the President or Vice President, of NRCI, and by an officer of FEI."

Nowhere in the written Agreement is there any language about (i) the importance of the Zacharias patent to the commercial exploitation of the atomic clock, (ii) the existence of an outstanding claim against Hewlett-Packard, and (iii) any

language concerning proper patent protection to enable Frequency to compete with Hewlett-Packard.

The District Court, however, received in evidence and used as a basis for its decision in this case Bloch's testimony at trial on these issues (R.131, 134 and 136).

The trial Court found that " . . . Lerner takes the instrument subject to the defense of failure of consideration and cannot enforce the Note the extent that Frequency received nothing in exchange for it." (R.94) and found that there was "undisputed testimony" of the importance of the Zacharias patent (R.97) which gave rise to the Court's holding that National and Lerner deceived Frequency. In each instance the trial Court relied, adopted and used the trial testimony of Bloch as to conversations with Lerner and others which took place prior to the execution of the Purchase and Sale Agreement. (R. 131, 133, 136, 146, 155, 156).

None of Bloch's testimony concerning the transaction, including his testimony about the importance of the Zacharias patent should have been considered by the trial Court or used as a basis for its decision. Such oral testimony between Bloch, Lerner and others is excluded and barred by the Parol Evidence Rule.

The statutory provisions read as follows:

"Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as

are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (section 1-205) or by course of performance (section 2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

Mass. G.L.c. 106 §2-202.

In Massachusetts the Parol Evidence Rule is a rule of substantive law and not a rule of evidence. Even though the prior agreement or statement is admitted in evidence without objection it cannot be considered by the Court.

Frich Co. v. New England Insulation Co., 347 Mass.461, 467, 198 NE2d 433, 437(1964). The Parol Evidence Rule as applied in Massachusetts draws no distinction between oral and written evidence.

The findings of the trial Court could not be made without reliance upon the forbidden evidence. Those findings which are made on the basis of evidence outside of the four corners of the Purchase and Sale Agreement (Exhibit 1, R.12) must be disregarded and stricken by this Court of Appeals because the use and consideration of such evidence is contrary to and prohibited by the terms of the agreement itself (R.18), the statutory provisions of UCC §2-202 and the cases.

The application of the Parol Evidence Rule was raised by the Court itself at trial and argued by counsel for Lerner in its post trial memorandum. The matter has been raised prior to this appeal.

The District Court at trial alluded to the Parol Evidence Rule at page 132 of the trial transcript (R.291) as follows:

"You see, the representations and the warranties may very well be merged in the agreement and they may be subject to the procedural [parol] evidence rule. If you talk about a common law fraud, at least in New York there is no merger."

At the closing in New York City on February 3, 1969, additional changes in the Agreement were made by counsel for Frequency, Kent M. Klineman. Klineman did not testify at the trial and his deposition was not taken by any party. Drake's deposition was taken and admitted into evidence, Exhibit AK at the trial. Drake testified that the changes made in the Agreement were made at the request of Frequency's attorney Klineman. (Exhibit AK pp. 79-80).

The marked up Agreement was the final written expression of the deal between National and Frequency and did not include those matters which Bloch at trial testified were so essential to the transaction. The findings of the District Court based on parol evidence should in effect be stricken from the record.

The Court found, at page 9 of its opinion (R.95), that Bloch had several meetings with Lerner in Lerner's offices in New York, that Lerner spoke of a very strong patent position that National held and that either Lerner or Oddi handed Bloch a memorandum (Exhibit 46, R.456) which was prepared by National's patent attorneys.

On the basis of this evidence the Court found that the memorandum stated the Zacharias patent was valid and that Hewlett-Packard was infringing it (R.95). The sole source of evidence at trial of the claimed representations of patent validity and of the alleged infringement of two of the nineteen Atomichron patents was from Lerner's and Bloch's testimony of the meetings held between Bloch and Lerner in New York City. The integration clause of the Agreement as well as the Parol Evidence Rule requires the trial Court and this Court to exclude all such evidence.

All of the evidence received by the Court concerning the statements of patent validity, concerning the statements of causes of action against Hewlett-Packard concerning the statements of the importance of the Zacharias patent was based on the testimony of Bloch and Lerner about meetings held prior to the execution of the Agreement. Bloch was and is president and chairman of the board of Frequency, was and is the largest single stockholder owning approximately 22% of the outstanding shares of Frequency (R.125). Bloch is an electrical engineer and studies atomic physics and mathematics. He testified that in his mind there was only one patent of any value and that was the Zacharias patent (R.130).

The importance of the Zacharias patent was not known or disclosed to either Lerner or any other persons negotiating with Frequency on behalf of National.

Oddi's deposition, defendant's Exhibit AJ and Drake's deposition defendant's Exhibit AK were received in evidence

by the trial Court (R.441). Oddi stated (R.08) that he did not recall Bloch or anyone at Frequency saying to him that the Zacharias patent was the important patent in the transaction. Oddi said he did not recall Bloch or anyone at Frequency saying that they would not go through with the transaction if the Zacharias patent was not valid (R.609). Up until the closing date, no one from Frequency, or anyone in their behalf, stated to Drake that they would not close if there was any question as to the validity of the Zacharias patent. (Tr.85 R.665). Drake said that the matter of the validity of any one or more of the patents never came up.

The Agreement specifically refers to the subject matter which was discussed between Bloch and Lerner at the three meetings held in Lerner's office in New York in early July or August of 1968 (R.133-136) at the second meeting at the end of November of 1968 (R.146) and at the third meeting late in November or early December at which Mr. Oddi was present (R.155). At the third meeting, according to Bloch's testimony he was handed a copy of the preliminary memorandum dated November 14, 1968, (R.456) prepared by National's patent lawyers.

Thus the sole evidence admitted at trial which could be the basis for the trial Court's finding that the Zacharias patent was essential to Frequency is from the testimony of meetings and conversations prior to the final preparation and execution of the Agreement and such evidence cannot be considered by the trial Court or this Court under the Parol

Evidence Rule. Mears v. Smith, 199 Mass.319(1908);

Dekofski v. Leite, 336 Mass. 127, 130(1957).

Not only is the parol evidence to be excluded by the Court on the issue of contract warranties and representations but also on the issue of deceit!

In Massachusetts a cause of action for deceit will not lie when the alleged false and fraudulent representations relate to matters within the terms of a memorandum of sale. DePasquale v. Bradley & McIntosh Co., 258 Mass. 483 (1927).

In the DePasquale case plaintiffs sought recovery from the defendants because two separate lots of sugar were not of the quality which the plaintiffs claimed were orally represented to them. Neither memorandum of sale contained representation as to quality and the plaintiffs sought to rescind the transaction on the basis of deceit. The jury returned a verdict for the plaintiffs but after the verdict was received the judge entered a verdict for the defendant. The Massachusetts Court affirmed the lower Court and at page 487 stated as follows:

"At trial there was no claim and no offer made to prove that the contract introduced in evidence by the plaintiffs were executed by them by reason of any fraud or misstatement as to the nature of the instrument which they signed or of any fraud or misstatement as to the meaning of the contents of the executed memorandums." (Emphasis supplied.)

At page 488:

"It is settled by many decisions that the terms of a written instrument cannot be varied by parol evidence though put in by both parties. Had the contract embodied

all that the plaintiff alleges was promised in the premises, his remedy for damages for failure to perform would have been upon the contract. He cannot maintain an action for the same damages where some of the promises were not so embodied by alledging the omitted promisses to be fraudulent representations, and seeking recovery in tort. Loughery v. Central Trust Co. 258 Mass.172."

In the DePasquale Case neither memorandum contained provisions as to the quality of sugar and although the Court stated at page 488 that the plaintiffs had a cause of action in contract if the sugar delivered was not of a quality reasonably fit for use for which the defendant was told the plaintiffs intended to put it but that a breach of an implied warranty of fitness does not give rise to an action of deceit.

The DePasquale Court held, at P.489:

"The evidence should not have been received and the case stands before this Court with such evidence disregarded and as if stricken from the record." (emphasis supplied).

See also the following cases in Massachusetts where express contract provisions were held to preclude suits to set aside agreements for fraud. O'Meara v. Smyth, 243 Mass. 188(1922); Sullivan v. Roche, 257 Mass. 166(1926). See also, the annotation entitled "Legal Effect of Parol Evidence Inadmissable Under Parol Evidence Rule But Admitted Without Objection", 92 ALR810, 819, 824(1934).

Parol evidence may be admitted only if a term of the agreement is ambiguous. The admission of such evidence should be allowed only so far as such evidence tends to disclose the true interpretation of the ambiguous word. The

determination of whether a contract provision is ambiguous must be made from the document itself; extraneous conversations can not be used to create an ambiguity not manifest in the written document. DeKofski v. Leite, 336 Mass.127, 129(1957).

There has been no preliminary finding of ambiguity by the trial Court.

Accordingly, the trial Court must be reversed because the findings and holdings were not based upon sufficient competent evidence.

This Court of Appeals should follow the Massachusetts Parol Evidence Rule because it is a rule of substantive law and in accordance with paragraph 16 of the Agreement (R.18) Massachusetts law applies.

5. THE TRIAL COURT INCORRECTLY APPLIED MASSACHUSETTS
LAW TO HOLD THAT LERNER HAD DECEIVED FREQUENCY
BY MAKING STATEMENTS CONCERNING THE VALIDITY OF
THE ZACHARIAS PATENT.

The Massachusetts rule of the elements necessary to
prove deceit is set forth in Chatham Furnace Co. v. Moffatt
147 Mass. 403 (1888), and the Court stated at page 404:

"It is well settled in this Commonwealth
that the charge of fraudulent intent, in an action
for deceit, may be maintained by proof of a state-
ment made, as of the party's own knowledge, which
is false, provided the thing stated is not merely
a matter of opinion, estimate, or judgment, but is
susceptible of actual knowledge; and in such case
it is not necessary to make any further proof of
an actual intent to deceive. The fraud consists in
stating that the party knows the thing to exist,
when he does not know it to exist; and if he does
not know it to exist, he must ordinarily be deemed
to know that he does not."

In the Chatham Furnace case the defendant exhibited to the
plaintiff a survey of a mine which was made for the defendant.
The plan made by the surveyor with the defendant's know-
ledge was not accurate and a mass of iron ore, the subject
matter of the litigation, was not located within the boundar-
ies of the land covered by the defendant's lease all as repre-
sented to the plaintiff. The Court concluded that the defen-
dant knew that what purported to be a survey was not in all
respects an actual survey, that the line had not been verified
but merely assumed. The Court at page 405 stated:

"In consequence of this erroneous assumption
the survey was misleading, the iron ore being in
fact outside those boundaries."

The Court further stated at page 406 that the first line which

had not been verified was erroneous and this statement was clearly a thing which was susceptible of knowledge. Therein was the fraud and the deceit under Massachusetts law.

In Harris v. Delco Products, Inc., 305 Mass. 362 (1940), the parties entered into a written agreement by which the plaintiff agreed to sink a well on the defendant's premises at a point to be mutually agreed upon. The agreement was silent with respect to any knowledge or representations by the well digger, Harris, concerning whether or not fresh or brackish water would be encountered upon the digging of the well. Prior to the execution of the agreement, Harris stated to the defendant that he knew the conditions because he had been drilling holes on land located across the street. The defendant relied upon this representation. Upon drilling the well, salt water was encountered and the project abandoned. The case was brought by Harris seeking to collect from the defendant for his services. The Court stated at page 365 that:

"Representations, although false, concerning matters not susceptible of actual knowledge have been held to be nonactionable, at least when made by one not in a fiduciary capacity (Case cited.), and it is a general rule that the law refuses to permit recovery in tort damages resulting from reliance upon false statements of belief of conditions to exist in the future or of matters promissory in nature. (Cases cited.)

The Court in Harris v. Delco Products, Inc., supra. at page 365 stated:

"The representations must be held to have been, at most, expressions of an opinion concerning the ground conditions, and the defendant's representative must have so understood them and must have known that Harris was doing nothing more than expres-

sing his belief, or what purported to be his belief, concerning these conditions. (Cases cited.) The person to whom the representation is addressed is bound by what is apparent from the subject matter under discussion, and where one makes a statement as of his own knowledge relative to the subject matter, not susceptible of actual knowledge, it is held to amount to nothing more than an expression of strong belief, and must be so understood and considered."

In Harris the oral representation that there would be no chance of striking salt water is a statement of opinion and not a statement of fact susceptible of actual knowledge.

In Schooner Dartmouth, Inc. v. Piper, 349 Mass. 347 (1965), the Massachusetts Court held that a representation by an insurance agent concerning the coverage afforded by an insurance policy was a statement of opinion and not a statement of fact susceptible of actual knowledge. There was no finding that the statement was made to deceive or with the knowledge that it was false and, even though the statement was made by the defendant Piper with every reason to believe that the plaintiff would rely upon the statement, it was not actionable deceit.

Yorke v. Taylor, 332 Mass. 368 (1955), Pietrazak v. McDermott, 341 Mass. 107 (1960) and Robichaud v. Athol Credit Union, 352 Mass. 351 (1967) can be distinguished from the case at bar. Under Massachusetts law the elements of deceit or fraud require, inter alia, a statement of fact of the party's own knowledge not statements of opinion, estimate or judgment, but statements susceptible of actual knowledge. The Pietrazak case is one of many of "wet cellar" cases considered by the

Massachusetts Court and arises out of an oral representation by the builder and seller of the house. The Court found that the defendant builder made a statement of fact susceptible of actual knowledge, not an opinion. cf. Verid v. Mason, 341 Mass. 527 (1960).

In the case at bar the District Court found (R. 98):

"Lerner and National's other personnel made statements of fact concerning the patent's validity and the existence of a cause of action for patent infringement as of their own knowledge."

This finding of the trial Court cannot be supported by the evidence. The testimony at trial concerning statements made to Bloch by Lerner were, as follows:

"...Lerner emphasized the importance and a very strong patent position that National holds...." (R. 134).

"Now, if it helps any, Mr. Bloch may very well have referred to the Zacharias Patent which I knew existed but I don't know any more about it today than I did then." (R. 375 contra. R. 95).

This is not the kind of evidence which should be the foundation for a court's determination necessary to make a holding of deceit. Where is the statement that deceived? At best it can be stated that Lerner or someone at National stated that the patent attorneys said the Zacharias and Mainberger patents were or possibly were infringed. If the patent attorneys made such a statement, where is the falsehood? Bloch was obviously more knowledgeable about patents than Lerner, and so, where is the reliance?

The elements of deceit under Massachusetts law cannot be found in the record of this case. Lerner's statements concerning

patent validity were not statements of his own knowledge of existing facts "susceptible of actual knowledge."

At no time prior to March 17, 1971, the date of the Lyon memorandum to Frequency (Exhibit Y R.524) did National's patent counsel or Frequency have any reason to believe in the invalidity of the Zacharias patent.

At all times material to the events alleged in the complaint and counterclaim Lerner believed and relied upon National's patent counsel. The November 14, 1968, preliminary memorandum, Exhibit 46 (R.456) is a product of the patent lawyers which outlined their position. It was known to Bloch that the memorandum was prepared by patent counsel (R.158) and Bolch testified that he relied on that memorandum (R.159). There was no reliance on Lerner or National but rather on National's patent lawyers.

The holding by the trial Court that Lerner is liable in deceit under Massachusetts law is error because such holding is not based on sufficient evidence to sustain the burden of proof and because statements of patent validity are statements of opinion and in Massachusetts are not actionable in deceit.

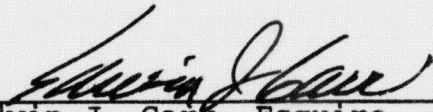
CONCLUSION

The judgment of the United States District Court for the Southern District of New York should be reversed and judgment should be entered in favor of Lerner on his counterclaim against Frequency in the full amount of the balance due on the Note, viz., \$260,000, plus interest from February 3, 1972, attorneys fees as provided in the terms of the Note and the costs of this appeal.

In the alternative, this Court should reverse the finding of the District Court and enter an order for a new trial on the merits.

Respectfully submitted,

Dated: May 28, 1976, at
Boston, Massachusetts.


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ADDENDUM

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Copies of selected Massachusetts cases cited in
the brief, as follows:

<u>Gilmore v. Aiken</u> , 118 Mass. 94 (1875)	50
<u>DePasquale v. Bradley & McIntosh Co.</u> , 258 Mass. 483 (1927)	54
<u>Harris v. Delco Products, Inc.</u> 305 Mass. 362 (1940)	61
<u>Sears v. Leland</u> , 145 Mass. 277 (1877)	67
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which transferred this lease to the defendant satisfied the plaintiff's part of the agreement. Whatever risk of title there was must fall on the defendant. In *Austin v. Harris*, 10 Gray, 296, cited by the defendant, the agreement, in addition to an assignment of the lease, was for the giving up and surrender of all that part of the building occupied by the lessee, and the decision is put on the ground that there was an agreement to give up the legal possession, if not more. It ought not to govern this case.

The case should therefore have been submitted to the jury. It was error to rule as matter of law that the action could not be maintained. *Verdict set aside.*

JAMES T. GILMORE vs. CHARLES L. AIKEN & another.

Suffolk. March 18. — June 23, 1875. AMES & ENDICOTT, JJ., absent.

B, by an instrument under seal, sold, transferred and assigned to A. "all the right, title and interest" he had in three described patents, the first issued to himself and C., the second to himself, the third issued to himself and reissued to C., by whom it was assigned to B., and also in a petition for a patent then pending, to have and to hold the same to A. for the full term for which the same were granted or the last might be granted, as fully and entirely as the same would or could have been enjoyed by him had the assignment not been made; authorized A. to use B.'s name, aid and assistance, if necessary, for the purpose of obtaining an extension of any of the patents; assigned all interest which he should thereafter acquire therein, and covenanted that he would do no act which would in any way impair the right he then had to the patents or either of them. *Held*, that the assignment amounted only to a deed of quitclaim; and, the validity of the first and second patents and of the original issue of the third patent not being denied, that promissory notes given in consideration of the sale and assignment of all the patents under this instrument were upon valid consideration, even if the reissue of the third patent was void because not duly granted and issued according to law.

CONTRACT upon two promissory notes, dated April 22, 1871, made by the defendants to the plaintiff, one for \$5000 payable in twelve months, and the other for \$10,000 payable in eighteen months.

The defendants in their answer alleged, and at the trial before *Endicott, J.*, offered evidence tending to prove, that the consideration of these notes was the sale and assignment by the plaintiff to the defendants of his interest in three patents, described in the

instrument of assignment, which they produced at the trial, and which is printed in the margin,* and that the reissue of the third patent was void, because not duly granted and issued according

* "Be it known that I, James T. Gilmore, of Painesville in the county of Lake and State of Ohio, in consideration of one dollar and other good and valuable consideration, to me in hand paid by Walter Aiken and Charles L. Aiken, both of Franklin in the county of Merrimack and State of New Hampshire, do hereby sell, assign and transfer to them all the right, title and interest I have in and to the following described patents; to wit, one bearing date January 26, 1869, and numbered 86,297, issued to myself and one Leonard Anderson as the inventors of a new and useful 'improved machine for dressing millstones;' another bearing date May 26, 1863, and numbered 38,670, issued to myself as the inventor of a new and useful 'improvement in machinery for dressing or working stone.' The other bears date October 23, 1862, originally issued to myself, and reissued to Leonard Anderson, of said Painesville, on the date aforesaid, which said reissue is numbered 3279, and is for a new and useful 'improved machine [for] tramming, staffing and fine-dressing of millstones,' and assigned by said Anderson to myself.

"Also I hereby sell, assign and transfer to said Walter Aiken and Charles L. Aiken all my right, title and interest in a petition for a patent now pending before the commissioner of patents at Washington in the name of myself and John S. Crane, of Franklin aforesaid, whether the said patent has already been granted and allowed or not, the same being for a further improvement in machines or machinery for dressing and working stone.

"To have and to hold the same to the said Walter Aiken and Charles L. Aiken, their heirs and assigns, for the full term for which the same were granted, and for which the last aforesaid patent may be granted, as fully and entirely as the same would have been or could have been held and enjoyed by me had this assignment and sale not been made; with the further right to whatever extension, if any, may be granted for either of said patents by the commissioner of patents or Congress; and I hereby authorize said Walter Aiken and Charles L. Aiken, or their assigns, to use my name, aid and assistance if the same shall be necessary at any time for any purpose in getting said extension of either or all of said patents; and I hereby agree to assign to them at any time any right which may hereafter be acquired by them in connection with or relating to said patents by extension or otherwise in my name, upon the condition that I shall be in no way charged with any expense in relation to such right or extension; and I do hereby covenant with said Walter Aiken and Charles L. Aiken that I will do no act which shall in any way impair the right I now have to said patents or either of them and hereby assigned to them.

"Witness my hand and seal this twenty-second day of April A. D. 1871.

"James T. Gilmore. [Seal.]

"Witness, Frank D. King, Frank Walton."

to law, and the notes were therefore without consideration and void.

The judge reserved for the determination of the full court the following questions :

1. Whether the instrument of assignment was such as to entitle the defendants to prove that the reissue was invalid.
2. Whether the reissue was void by reason of the facts set forth in the report, which are not now important to be stated.

If the court should decide either of these questions in the negative, the plaintiff was to have judgment for the whole amount of the notes, with interest. If the court should decide both questions in the affirmative, and should further hold that the defendants were entitled to an apportionment or abatement of the amount of the notes, the case was to be sent to an assessor to determine the amount thereof.

G. L. Roberts, for the plaintiff, cited, upon the first question, *Whitmore v. South Boston Iron Co.* 2 Allen, 52; *Harper v. Ross*, 10 Allen, 332; *Jamaica Pond Aqueduct Co. v. Chandler*, 9 Allen, 159; *Brown v. Jackson*, 3 Wheat. 449; *Oliver v. Piatt*, 3 How. 333; *Adams v. Cuddy*, 13 Pick. 460; *Allen v. Holton*, 20 Pick. 458; *Blanchard v. Brooks*, 12 Pick. 47; *Sweet v. Brown*, 12 Met. 175; *Hoxie v. Finney*, 16 Gray, 332; *Jones v. Huggeford*, 3 Met. 515; *Shattuck v. Green*, 104 Mass. 42; *Sherman v. Champlain Transportation Co.* 31 Vt. 162; *Ashcroft v. Walworth*, 2 Pat. Off. Gaz. 46; *Turnbull v. Weir Plow Co.* 7 Pat. Off. Gaz. 173; *Johnson v. Willimantic Linen Co.* 33 Conn. 436; *Woodworth v. Hall*, 1 Wood. & M. 389; *French v. Rogers*, 1 Fisher's Pat. Cas. 133; *Read v. Bowman*, 2 Wall. 591; *Kerr v. Lucas*, 1 Allen, 279; *Winsor v. Lombard*, 18 Pick. 57; *Mizer v. Coburn*, 11 Met. 559; *Lamb v. Crafts*, 12 Met. 353; *Harmon v. Bird*, 22 Wend. 113; *Dean v. Mason*, 4 Conn. 428; *Slaughter v. Gerson*, 13 Wall. 379; *Taylor v. Hare*, 1 N. R. 260; *Hall v. Conder*, 2 C. B. (N. S.) 22; *Smith v. Neale*, 2 C. B. (N. S.) 67; *Smith v. Scott*, 6 C. B. (N. S.) 771.

C. Browne & Jabez S. Holmes, for the defendants, upon the same question, cited *Nash v. Lull*, 102 Mass. 60; *Parish v. Stone*, 14 Pick. 198; *Earle v. De Witt*, 6 Allen, 520; *Henshaw v. Robins*, 9 Met. 83; *Young v. Cole*, 3 Bing. N. C. 724; *Barr v. Gibson* 3 M. & W. 390.

GRAY, C. J. The extent of the interest undertaken to be conveyed by the plaintiff to the defendants, and of the obligation of estoppel created by such conveyance, depends upon the terms of the written instrument of assignment executed by him to them.

By that instrument, he sells, assigns and transfers to them only the right, title and interest which he has in three patents, one issued to himself and Anderson, a second issued to himself, and a third issued to himself and reissued to Anderson. The further clause, in the nature of a habendum, "to have and to hold the same" "for the full term for which the same were granted," is equally limited by the words "as fully and entirely as the same would have been or could have been held and enjoyed by me had this assignment and sale not been made." The grant is not enlarged, so far as regards the question before us, by the further grant of rights in any extensions of the patents, or by the agreement for further assignment. And the only express covenant is that the plaintiff "will do no act which will in any way impair the right I now have to said patents or either of them and hereby assigned to them." The assignment is in the nature of a quitclaim deed of whatever right, title or interest the plaintiff has or may acquire in the patents specified, and creates no warranty that either of the patents was valid.

The validity of the first and second patents and of the original issue of the third patent is not denied. The transfer of the plaintiff's rights in those was a legal, and there are no facts in the case upon which the court can say that it was not a sufficient consideration for the notes sued on.

According to the terms of the report, therefore, upon which the case has been reserved for our determination, there must be

Judgment for the plaintiff for the whole amount.

JOSEPH G. DePASQUALE & another vs. BRADLEE &
McINTOSH Co.

Suffolk. January 11, 12, 1927. — March 2, 1927.

Present: RUGG, C.J., CROSBY, PIERCE, WAIT, & SANDERSON, JJ.

Deceit. Practice, Civil, Exceptions, Verdict with leave reserved under G. L. c. 231, § 120. Evidence, Extrinsic affecting writings. Contract, In writing.

An action of tort for deceit cannot be maintained by the buyer of sugar against the seller where it appears that the sale was in accordance with a contract in writing signed by the plaintiff, that the sugar was received, paid for and placed in a warehouse by the plaintiff, and that the plaintiff relied as the basis of the action upon representations, alleged to have been made by the defendant as an inducement to the contract and to have been false, that the sugar would satisfy a requirement as to quality which was not set out in the contract; and there is no contention by the plaintiff that the contract was executed by him by reason of any fraud or misstatement as to the nature of the contract, or of any fraud or misstatement as to the meaning of the executed instrument.

A breach of implied warranty of fitness in a sale does not give rise to an action of tort for deceit.

At the trial of an action of contract or tort relating to a sale of sugar, the trial judge, subject to an exception by the defendant, erroneously admitted evidence which tended to vary the terms of a contract of sale in writing which the plaintiff did not contend was executed by him by reason of any fraud or misstatement as to the nature of the contract, or of any fraud or misstatement as to the meaning of the executed in-

strument. At the close of the evidence, the plaintiff elected to go to the jury only on counts in tort for deceit in representing the sugar to be of a quality which was not set out in the contract. A verdict was received and recorded with leave reserved under G. L. c. 231, § 120, and later, in accordance with such leave, a verdict was entered for the defendant by order of the judge, and the plaintiff alleged exceptions. *Held*, that, although the case was before this court on exceptions by the plaintiff only, it was open to the defendant to contend that the evidence, although admitted, was of no effect to vary the contract, and that the plaintiff could not maintain the action of tort for deceit by alleging that warranties omitted from the valid contract in writing were fraudulent misrepresentations.

CONTRACT OR TORT, with a declaration described in the opinion. Writ dated October 6, 1920.

In the Superior Court, the action was tried before *Cox, J.* Material evidence is described in the opinion. As stated in the opinion, the plaintiffs elected at the close of the evidence to proceed only on the counts in tort. The jury found for the plaintiffs in the sum of \$9,600.50. The trial judge, upon the receipt but before the recording of the verdict, reserved leave under G. L. c. 231, § 120, to enter a verdict for the defendant, and thereafter, upon motion by the defendant and by order of the judge, a verdict was entered for the defendant. The plaintiffs alleged exceptions.

W. A. Murray, for the plaintiffs.

J. P. Carr, for the defendant.

PIERCE, J. This action arises out of the sale by the defendant of two lots of sugar to the plaintiffs, under two written contracts, dated respectively May 4 and May 6, 1920. The lot sold under the "Memorandum of Sale" dated May 4, 1920, was called, in the "Memorandum," "American Washed Sugar"; the amount was five hundred bags, each bag of about one hundred pounds net. The lot sold under the "memorandum of sale" dated May 6, 1920, was called in the "memorandum" "Foreign Refined Granulated Sugar"; the amount of such sugar was two hundred fifty bags, each bag weighing net approximately two hundred twenty-four pounds.

The Central American, or washed sugar, arrived in New York on the steamship "Cristobal" on July 26, 1920. The defendant notified the plaintiffs when the sugar arrived and

the plaintiffs ordered it sent to Worcester. Irrevocable letters of credit issued out of the Worcester Bank and Trust Company, under which payments were made to the defendant for these two lots of sugar against shipping documents. The "Foreign Refined" sugar arrived in New York on board the steamship "Sophie Frankel" on July 8, 1920, and by the direction of the defendant was consigned to the order of the State Street Trust Company, and by the plaintiffs ordered to be shipped to a warehouse at Worcester. The "Washed Sugar" arrived in Worcester on August 10, 1920, the "Foreign Refined" on August 11, 1920. The bank paid the freight, ordered the sugar warehoused and notified the plaintiffs to that effect.

By each contract the sugar was sold "duty paid, ex ship New York." No inspection of either lot after its arrival at the Worcester Cold Storage and Warehouse Company on August 10 and 11, 1920, respectively, was made by the plaintiffs until September 28, 1920. On that date one of the plaintiffs inspected the sugar, and on September 30 and on October 1 wrote the defendant to the effect that the Central American Washed Sugar was not like the sample given at the time of the making of the contract; that the Foreign Refined granulated sugar was not as represented; that the sugar was valueless; that the plaintiffs held it to the order of the defendant; and that they rescinded both shipments and "hereby tender to you all of the sugar which you sent us and which is now deposited in the Worcester Cold Storage and Warehouse Co." To these letters the defendant replied, under date of October 4, 1920, as follows: "Referring to your letter of September 30th, please be advised that the Central American Washed and the Foreign Refined sugars were delivered in accordance with contract."

At the close of the evidence the trial judge ordered the plaintiffs to elect between counts one, three, four, and six, based on alleged breaches of the contracts, and counts two and five, based on alleged false and fraudulent representations. The plaintiffs waived the counts in contract, and elected to stand on counts two and five. The jury returned a verdict for the plaintiffs in the sum of \$9,600.50. After

the verdict was received, but before it was approved and recorded, the judge reserved leave, with the assent of the jury, to enter a verdict for the defendant, as provided in G. L. c. 231, § 120; and thereafter, on motion of the defendant, the judge made an order in accordance with the leave reserved and a verdict was entered for the defendant, to which the plaintiffs excepted. The case is before this court on that exception.

The plaintiffs offered, and the judge received in evidence without exception of the defendant, the contracts dated May 4, 1920, and May 6, 1920, respectively. It was admitted by the defendant that under letters of credit on the Worcester Bank and Trust Company payment for the full amount set out in the contracts for the two lots had been made to the defendant. The contracts, admitted in evidence, read as follows: "May 4, 1920. SOLD TO: A. De PASQUALE'S SONS — MILFORD, MASS. 500 (five hundred) bags (bags of about 100 pounds net) of CENTRAL AMERICAN WASHED SUGAR @ 23c (twenty-three cents) per pound, duty paid, ex ship New York. Landed weights and tares. SHIPMENT: During April and May from Central America. PAYMENT: Buyer to open immediately irrevocable bank credit through Boston, for approximate value, in favor of Bradlee & McIntosh Co., payable against shipping documents. Weight differences to be settled after final returns are received. Force Majeure conditions to apply to this contract. No arrival no sale." "May 6, 1920. SOLD TO: A. De PASQUALE'S SONS — MILFORD, MASS. 250 (two hundred fifty) bags (approximate weight 224# net each) Foreign Refined Granulated Sugar, packed in double bags, @ 24c (twenty-four cents) per pound, duty paid, ex ship New York. SHIPMENT: From source during April and May, expected to arrive in New York June and July. PAYMENT: Buyer to open immediately irrevocable bank credit for approximate value in favor of Bradlee & McIntosh Co., payable against shipping documents. Force Majeure conditions to apply to this contract. No arrival no sale."

Count two, in tort, in substance alleges that the defendant "for the purpose of inducing the plaintiffs to buy . . . [the

Central American Washed Sugar] fraudulently and falsely represented to the plaintiffs that the said sugar was the same in kind and quality as a certain sample thereof; that the plaintiffs, relying upon said representation, agreed to buy said lot of sugar at said price; that upon notice from the carrier with whom the defendant shipped said sugar, that the sugar had arrived, the plaintiffs, relying upon said false and fraudulent representation, that the same corresponded with said sample, paid to the defendant therefor the sum of \$11,500; that the defendant mailed to the plaintiffs a memoranda [sic] of sale, a copy of which is hereto annexed marked 'A,' that the plaintiffs, relying upon said false representation, signed the same and remailed it to the defendant." Count five, in tort, alleges that the defendant "for the purpose of inducing the plaintiffs to buy . . . [Foreign Refined Granulated Sugar] fraudulently and falsely represented to the plaintiffs that the said sugar was the same in kind and quality as American Refined Sugar, and otherwise made representations relative thereto; that the plaintiffs, relying upon said false and fraudulent representations, agreed to buy said lot of sugar at said price; that upon notice from the carrier with whom the defendant shipped said sugar, that the sugar had arrived, the plaintiffs, relying upon said false and fraudulent representations, paid to the defendant therefor the sum of \$13,450; that the defendant mailed to the plaintiff a memoranda [sic] of sale, a copy of which is hereto annexed marked 'B,' that the plaintiffs relying upon said false representations, signed the same and remailed it to the defendant." Each count sufficiently asserts reliance upon the alleged representations, and traverses the truth of such alleged misstatements.

At the trial there was no claim and no offer made to prove that the contracts introduced in evidence by the plaintiffs were executed by them by reason of any fraud or misstatement as to the nature of the instruments which they signed or of any fraud or misstatement as to the meaning of the contents of the executed memorandums. In fact one of the plaintiffs testified, in substance, that after a talk with the defendant he received the "two memos of sale" from the

defendant through the mail, signed them and mailed them back, "because . . . [he] relied on those statements he [the defendant's treasurer] made prior to the time he mailed them." It follows that the memorandums as contracts are not open to successful attack. *Sullivan v. Roche*, 257 Mass. 166, 171. *O'Meara v. Smyth*, 243 Mass. 188. In passing it is to be noted that the memorandum of sale dated May 4, 1920, makes no provision that the sugar shall correspond with a sample, and that the memorandum of sale dated May 6, 1920, makes no provision that the sugar therein described should be "the same in kind and quality as American Refined Sugar."

The contracts were fulfilled if the sugar when delivered at the storehouse at Worcester was merchantable sugar of the description set out in the terms of the memorandums of sale. The plaintiffs, nevertheless, had a cause of action in contract if the sugar delivered was not of a quality reasonably fit for the use to which the defendant was told the plaintiffs intended to put it. G. L. c. 106, §§ 16, 17. But a breach of an implied warranty of fitness does not give rise to an action of tort for deceit.

At the trial, against the exception of the defendant, the judge permitted one of the plaintiffs to state the talk he had with one Bradlee, treasurer of the defendant company, before the memorandums of sale were signed by the parties to them, and the action in tort (counts two and five) rests entirely upon statements of Bradlee which are alleged to have been "false and fraudulent representations" upon which the plaintiffs relied and which induced them to execute the contracts of sale. The position of the defendant is in no worse state under a direction of a verdict with leave reserved than it would be in the circumstances had it made no objection to the admission of the parol evidence and had made a written motion for a directed verdict for the defendant at the close of the evidence, which was allowed. It is settled by many decisions that the terms of a written instrument cannot be varied by parol evidence though put in by both parties. "Had the contract embodied all that the plaintiff alleges was promised in the premises, his remedy for damages

for failure to perform would have been upon the contract. He cannot maintain an action for the same damages, where some of the promises were not so embodied, by alleging the omitted promises to be fraudulent representations, and seeking recovery in tort." *Loughery v. Central Trust Co.* 258 Mass. 172. The evidence should not have been received, and the case stands before this court with such evidence disregarded and as if stricken from the record.

There was no evidence to warrant a finding for the plaintiffs on counts two and five. It results that judgment for the defendant should be entered on the verdict; and it is

So ordered.

HARRY V. HARRIS & another vs. DELCO PRODUCTS, INC.

Bristol. December 7, 1939. — February 28, 1940.

Present: FIELD, C.J., DONAHUE, LUMMUS, COX, & RONAN, JJ.

Contract, Validity. Fraud.

The facts, that a well digger, to induce a landowner, seeking a well of sweet water in land as near as one hundred yards on one side and two hundred yards on another to salt tide water, to make a contract with him for the digging of the well, represented to him that "there would be definitely no chance of striking salt water," and that salt water was struck and further digging was abandoned, were no defence to an action of contract for the services in digging: the defendant in the circumstances must have known that the representation was of a fact not then susceptible of actual knowledge.

CONTRACT. Writ in the Second District Court of Bristol dated September 27, 1938.

On removal to the Superior Court, the action was tried before *Walsh, J.*, who ordered a verdict for the plaintiffs in the sum of \$257.50.

I. H. Simon, (*J. Lifrak* with him,) for the defendant.

G. B. Searls, (*G. H. Brown* with him,) for the plaintiffs.

Cox, J. The parties executed a written agreement under seal on August 10, 1938, by the terms of which the plaintiffs agreed to sink a well on the defendant's premises at some point to be mutually agreed upon, and the defendant agreed to pay for the work at the rate of \$4 per foot, and "also to furnish and water." The only other provisions of the contract were that the well should be started with a drive pipe of a certain diameter; that it should be driven from the ground surface to ledge or bed rock and then should be continued into the rock until water was found, to a depth dictated by the defendant, limited, however, to a total depth of five hundred feet; that if it was necessary to reduce the size of the hole or to recase it, the plaintiffs should do this without extra cost to the defendant; and that a five-hour pumping test would be made at the expense of the plaintiffs.

The first count of the declaration is the only one that is material and it is based upon this contract.

Ledge was encountered at a depth of about seventy-eight feet, and the total depth drilled was two hundred twenty-five feet, at which point, apparently, salt water was struck.* There was uncontradicted evidence that no one can tell before starting to drill a well that is located near salt water whether salt water will be encountered. The defendant is engaged in the soft drink business and there is salt tide water on two sides of its plant — at a distance of about one hundred yards on the north, and about two hundred yards on the west. Its president and treasurer, one Lynch, who signed the contract in its behalf, testified that he told Harry V. Harris, one of the plaintiffs, the purpose for which the well was wanted; that, before the agreement was signed, Harris said that "we would get good, sweet water. He said he knew what the conditions were there because he had been drilling holes there for the Firestone and that he had gone down to the ledge and he knew exactly how deep the ledge was." There was evidence that Lynch relied upon this "representation"; that prior to this conversation, it had come to his attention "about some trouble with salt water in the neighborhood" and that he told Harris about that "At the time of the signing of the contract — or the week before the contract was signed." Lynch's secretary testified that she was present on August 10, the date the agreement was signed, and that in the conversation between Harris and Lynch she heard Harris say, "There would be definitely no chance of striking salt water." It could have been found that the defendant's premises are just across the street from the Firestone plant where the plaintiffs had made some borings for foundation tests.

After the charge, the trial judge submitted the following question to the jury: "Did Mr. Harry V. Harris make the representations to Mr. Lynch as testified to by Mr. Lynch and his secretary?" The jury's answer to this question was:

* There was uncontradicted evidence that, when it was discovered that the water was salty, further digging was abandoned on advice of the plaintiff Harris. — REPORTER.

"yes," whereupon the judge directed a verdict for the plaintiffs on the first count of the declaration, subject to the defendant's exceptions. The case is here upon the report of the trial judge, with the stipulation that if the representations that the jury found were made should have been submitted to the jury for determination as a defence to this action, then judgment is to be entered for the defendant; otherwise, judgment is to be entered on the verdict.

The issue upon which the case was tried was that of fraud; no other issue has been argued, and no other question is considered. The defendant does not attempt to vary by parol evidence the sealed instrument that it signed. Actionable fraudulent misrepresentations are not so merged in a written instrument procured by their means that they may not be made the basis of a suit to set aside or rescind the written instrument, *Weeks v. Currier*, 172 Mass. 53, 55; *Bates v. Cashman*, 230 Mass. 167, 168, or the basis of a defence to an action brought on the instrument.* *Pike v. Fay*, 101 Mass. 134, 137. *Twohig v. Daly*, 248 Mass. 49, 51. See *Howard v. Barnstable County National Bank of Hyannis*, 291 Mass. 131, 135-136.

The test to be applied in the case at bar to determine whether the defendant is to be relieved of its contract by reason of any alleged fraudulent misrepresentations is the same as that applied in actions of tort for deceit. In *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403, it was said at page 404: "It is well settled in this Commonwealth that the charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud consists in stating that the party knows the thing to exist, when he does not know it to exist; and if he does not know it to exist, he

* The defendant's answer contained the following: "... the defendant says that if it did sign the contract contained in the plaintiffs' declaration, it was induced by the fraud and false representations made to it by the plaintiffs." — REPORTER.

must ordinarily be deemed to know that he does not" (see cases cited). *Page v. Bent*, 2 Met. 371, 374. *Cole v. Cassidy*, 138 Mass. 437. *Alpine v. Friend Bros. Inc.* 244 Mass. 164, 167, and cases cited. "If a statement of a fact which is susceptible of actual knowledge is made as of one's own knowledge, and is false, it may be made a foundation of an action for deceit without further proof of an actual intent to deceive." *Weeks v. Currier*, 172 Mass. 53, 55. Representations, although false, concerning matters not susceptible of actual knowledge have been held to be nonactionable, at least when made by one not in a fiduciary capacity, *Lynch v. Murphy*, 171 Mass. 307, and it is a general rule that the law refuses to permit recovery in tort for damages resulting from reliance upon false statements of belief, of conditions to exist in the future, or of matters promissory in nature. *Loughery v. Central Trust Co.* 258 Mass. 172, 175. *Coe v. Ware*, 271 Mass. 570, 573.

Applying these general principles to the facts in the case at bar, we are of opinion that there was no error. Representations that were made related to a matter not then susceptible of actual knowledge. Even if we assume that the purpose to be accomplished by the plaintiffs was to provide a well of fresh water for the defendant, at the time of the alleged conversation the defendant's representative must have known that no one could tell whether fresh or salt water would be encountered without doing the very work that was the subject matter of the contract between the parties or work of that same nature. The representations must be held to have been, at most, expressions of an opinion concerning the ground conditions, and the defendant's representative must have so understood them and must have known that Harris was doing nothing more than expressing his belief, or what purported to be his belief, concerning those conditions. See *Ernest F. Carlson Co. v. Fred T. Ley & Co. Inc.* 269 Mass. 272, 278. The person to whom the representation is addressed is bound by what is apparent from the subject matter under discussion, and where one makes a statement as of his own knowledge relative to the subject matter, not susceptible of actual knowl-

edge, it is held to amount to nothing more than an expression of strong belief, and it must be so understood and considered. In *Spead v. Tomlinson*, 73 N. H. 46, it was said at page 61: "When a representation relates to a matter not susceptible of personal knowledge, it cannot be considered as anything more than a strong expression of opinion, notwithstanding it is made positively and as of the maker's own knowledge. The mere fact that it is stated positively cannot make it a statement of fact. The most any one can do as to such matters is to express his opinion. It cannot be found, from the single fact that such a statement is untrue, that it was made with fraudulent intent; there must also be evidence that the maker knew it was in some respect untrue, before there is anything to submit to the jury." The defendant is, therefore, left in the position where the representations made are not fraudulent so as to avoid the contract unless the maker of the representations knew them to be untrue, *Pike v. Fay*, 101 Mass. 134, 137; *Spead v. Tomlinson*, 73 N. H. 46, 61, and there is no evidence in the case at bar to warrant a finding that he did.

The case is distinguishable from *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403. There the material question was whether a mass of iron ore "which did in truth exist under ground" was within the boundaries of the land included in the defendant's lease, and the material part of the defendant's statement was, that it was in his ore bed. During the negotiations, the defendant exhibited to the plaintiff a plan of the survey of the mine which had been made for him, and, in the making of which, the surveyor, to the defendant's knowledge and assent, did not take the course of the first line leading from the shaft through which the mine was entered but assumed it to be due north, and the defendant never took any means to verify this line. In point of fact, this line did not run due north. If it had, the survey would have shown the mass of ore in question to have been within the bounds of the land covered by the defendant's lease. But because of this erroneous assumption, the survey was misleading, the iron ore being in fact outside these boundaries. "It thus appears that the defendant

knew that what purported to be a survey was not in all respects an actual survey The defendant took it upon himself to assert, as of his own knowledge, that this large mass of ore was in his ore bed, that is, within his boundaries Now this statement was clearly of a thing which was susceptible of knowledge." (Pages 405-406.) It was held that it might properly be found that the charge of fraudulent misrepresentations was sustained, although the defendant believed his statement to be true. In other words, in the *Chatham Furnace Co.* case, the statement in question was of a matter susceptible of knowledge.

The rule applied in the case at bar, relating to a representation as to a fact not susceptible of actual knowledge, is more clearly understood if the standpoint of the one to whom the statement is made is considered. That is, when he hears such a statement the rule in effect leaves him in this position: that regardless of what has been said about the matter, or of how strongly the statement has been put, he knows that the speaker cannot actually know what the fact of the matter is, and that, therefore, he is not justified in relying on what can, in its nature, be nothing more than the opinion, however strong, of the speaker on the matter. Our rule finds other support. *Gordon v. Buller*, 105 U. S. 553, 556-557. *Tuck v. Downing*, 76 Ill. 71, 95. *Crocker v. Manley*, 164 Ill. 282, 289-290. *Holbrook v. Connor*, 60 Maine, 578, 580-581. *Watts v. Cummins*, 59 Penn. St. 84, 89.

Judgment for plaintiffs on the verdict.

CHARLES W. SEARS vs. MARY F. LELAND.

Worcester. Oct. 4. — Nov. 23, 1887. C. ALLEN & KNOWLTON, JJ.,
absent.

If a person attaches mortgaged personal property which is in the possession of the mortgagor under a conditional sale, the terms of which have not been complied with, and, upon the demand of the mortgagee, pays the amount due on the mortgage to the latter, who assigns to him all his rights, title, and interest in the mortgage, such person cannot maintain a bill in equity against the mortgagee to recover the amount so paid by him, upon the ground that the payment was made under a mutual mistake as to the validity of the mortgage.

BILL IN EQUITY to recover the amount paid by the plaintiff upon a mortgage of personal property given by Eugene M. Worthing to the defendant, and by her assigned to the plaintiff, upon such payment, together with the amount of certain expenses incurred by the plaintiff. The defendant demurred to the bill for want of equity. Hearing in the Superior Court, before *Staples, J.*, who sustained the demurrer, and dismissed the bill; and the plaintiff appealed to this court. The facts appear in the opinion.

W. A. Gile, for the plaintiff.

G. H. Mellen, for the defendant.

DEVENS, J. By the amended bill it appears that Worthing was in possession of the property mortgaged (which was afterwards attached by the plaintiff) under a conditional sale, although nothing had been paid thereon, and the conditions of such sale had not been complied with. The defendant, upon the attachment of the property by the plaintiff, demanded the amount due upon her mortgage; the plaintiff paid the same, and the defendant then assigned to him all her right, title, and interest in the mortgage. The plaintiff now claims to recover from the defendant the amount paid by him upon said mortgage, together with certain expenses to which he has been subjected in restoring the property to the true owner, upon the grounds that the mortgage was invalid, and that said payment was made under a material mistake as to the validity of the mortgage. Whether the plaintiff should pay this mortgage or not was a matter at his own option; and the defendant was compelled to

accept such payment, or lose her rights by virtue of it. We do not perceive, upon the case as stated, that the mortgage was invalid as a security, even if it was in fact valueless.

The mortgagor, Worthing, having obtained property under a conditional sale, had a right to mortgage it, and, in the hands of the defendant, the security was a valid and subsisting one. He had the possession of the property, and the right to possession, and could dispose of the property with his right therein, even if the sale to him was liable to be defeated by non-performance of the conditions. *Day v. Bassett*, 102 Mass. 445. *Crompton v. Pratt*, 105 Mass. 255. Of the right which the defendant had to comply with the conditions of the sale she has been deprived by the act of the plaintiff.

But if this were otherwise, and if the mortgagor had no property or right in the articles mortgaged, the plaintiff has no ground of complaint against the defendant. The plaintiff obtained from the defendant an assignment of all her interest in the mortgaged property, but there was no warranty, and the words chosen were apt to express a conveyance of such right, title, and interest, if any, as she might have. Where the subject of a contract has no existence, as where two parties contract as to the sale of a horse, which, without the knowledge of either, is dead, the contract may indeed be rescinded. But this principle has no application where one voluntarily purchases such right, title, or interest in property as another may have, even if both parties are in error as to the extent or value of that title or interest, or even if in fact the seller has no right. The subject of the contract is such right, title, or interest as may exist.

Unless the plaintiff had satisfied this mortgage within the time prescribed by the statute, his attachment would have failed, as the mortgagor and his debtor were the same person. Pub. Sts. c. 161, §§ 74, 75. It was for him to determine whether it was for his interest to pay it and obtain the rights of the mortgagee. He cannot now complain that this right is of less value than he anticipated. He has received all he purchased. No fraud or misrepresentation on the part of the defendant is alleged, and it is not important that she supposed she was parting with a more valuable right than she in fact possessed.

Decree affirmed.

NAME OF BANKRUPT/DEBTOR NATIONAL RADIO COMPANY, INC.				DIST. FILE NO. 101 CHAPTER OR SECTION XI DATE PETITION FILED 8/11/70 DATE CLOSED DISCHARGE <input checked="" type="checkbox"/> Granted <input type="checkbox"/> Denied DATE DISCHARGED PETITION DATE DISMISSED DISMISSED BY NAME OF JUDGE		CASE NO. 70-1006 <input checked="" type="checkbox"/> Voluntary <input type="checkbox"/> Involuntary <input type="checkbox"/> Partnership <input checked="" type="checkbox"/> Corporation <input type="checkbox"/> Employee <input type="checkbox"/> Professional <input type="checkbox"/> Other (Type business) <input checked="" type="checkbox"/> Merchant <input type="checkbox"/> Manufacturer <input type="checkbox"/> Other (Business)	
ADDRESS OF BANKRUPT/DEBTOR (Number and Street) 111 Washington St.				CITY Melrose ZONE COUNTY Middlesex STATE Mass.		NAME OF REFEREE T.W. Lawless	
NO ASSET CASES ONLY CLAIMS AS SCHEDULED <input checked="" type="checkbox"/>				TOTAL \$ PRIORITY \$ SECURED \$ UNSECURED \$			
ATTORNEY FOR BANKRUPT OR DEBTOR <input checked="" type="checkbox"/>		NAMES AND ADDRESSES Brown, Rudnick, Freed & Gasmer, 85 Devonshire St., Boston Spec. Cnsl: Sellers, Conner & Cuneo, 1625 K St., N.W., Wash. D.C.					
ATTORNEY FOR PETITIONING CREDITORS <input checked="" type="checkbox"/>		Supervisory Receivers: Judge James M. Langan 84 State St., Boston Bernard A. Riemer, Esq. 15 Court Square Boston, Mass. 02108					
TRUSTEE <input checked="" type="checkbox"/>		Harold Horvitz, Esq. 3 Center Plaza Boston, Mass.					
ATTORNEY FOR TRUSTEE <input checked="" type="checkbox"/>		Fly, Shuebruk, Blume & Gaguine, New York City					
CHANGES OF PRINCIPALS							
19 70 DATE		PROCEEDINGS 846 nots. First Meet. of Creds. iss. 11-30-70. \$1.50 9-15-71, xerox cls. dkt. \$35.00 Petition for an Arrangement under Chap. XI-Reference entered 12 APPEARANCE entered by Sumner Lieberman, Esq. for The Diversey Corp. and Lafayette Radio & Electronics Co., and Toledo Scale creditors. APPEARANCE entered by Henry Friedman, Esq. for Sager Electrical Supply Co. a creditor. 11 Debtor's Petition for Authority to Operate Business and Appointment of Supervisory Receivers ALLOWED (Ord. ent.). Hearing held on Petition to Appoint Supervisory Receivers. After hearing same Court appointed Judge James M. Langan and Harold Horvitz of Boston, Mass., Supervisory Receivers,					

FORM BK 74
SEP. 1962

UNITED STATES DISTRICT COURT

BANKRUPTCY DOCKET

CHECK THIS BOX IF FILING FEES WERE PAID IN FULL AT TIME OF FILING

70-1006

DOCKET NUMBER

National Radio Company, Inc. debtor Chapter XI

PROCEEDINGS

DATE		
1971		
SEPT.	10	Certificate of Indebtedness No. 59, Approved.
	16	Certificate of Indebtedness No. 60, Approved.
	24	Certificate of Indebtedness No. 62, Approved.
	21	Appearance entered by Sanford M. Goldman, Esq. for Frequency Electronics, Inc.
	30	Certificate of Indebtedness No. 63, Approved.
Oct.	7	Certificate of Indebtedness No. 64, Approved.
	15	Debtor's Petition for Leave to Borrow Additional Money (\$600,000.00) ALLOWED (Ord. ent.).
	15	Certificate of Indebtedness No. 65, Approved.
	22	Certificate of Indebtedness No. 66, Approved.
OCT.	28	Certificate of Indebtedness No. 67, Approved.
NOV.	1	Debtor's Petition to employ the firm of Sullivan, Beauregard, Meyers and Clarkson of Washington D. C. as Special Counsel, fee to be determined by the Court ALLOWED (Ord.ent).
OCT.	29	Receiver's Petition for Partial Compensation in the sum of \$15,000.00
	29	Petition by Gladstone and Chain employed as accountants for the Receivers to be given partial and interim fees in the amount of \$9,000.00
	29	Receiver's Petition for Leave to employ Gladstone & Chain accountants ALLOWED (Ord.ent)
Nov.	4	Certificate of Indebtedness No. 68, Approved.
	12	Certificate of Indebtedness No. 69, Approved.
	18	Certificate of Indebtedness No. 70, Approved.
	24	Certificate of Indebtedness No. 71, Approved.
	30	Certificate of Indebtedness No. 72, Approved.
Dec.	2	Certificate of Indebtedness No. 73, Approved.
	9	Certificate of Indebtedness No. 74, Approved.
	16	Certificate of Indebtedness No. 75, Approved.
	22	Certificate of Indebtedness No. 76, Approved.
	30	Certificate of Indebtedness No. 77, Approved.
1972		
Jan.	5	Debtor's Petition to disaffirm real estate lease by its attorneys Brown, Rudnick, Freed & Gesmer, Esqs.
	7	Certificate of Indebtedness No. 78, Approved.
	17	Certificate of Indebtedness No. 80, Approved.
	19	Petition by Counsel for Debtor to be allowed \$2,627.63 fee.
	19	Petition by Debtor for leave to sell assets at public or private sale without notice ALLOWED (Ord.ent).
	19	Petition by Debtor to employ the firm of Kenway, Jenney and Hildreth as Special Counsel FEES not to exceed \$3000.00 without further order of court ALLOWED nunc pro tunc 8/12/70. (Ord.ent).
	20	Certificate of Indebtedness No. 81, Approved.
	26	Debtor's Petition for leave to employ Joseph Finn Co. of Boston auctioneer
FEB.	1	APPEARANCE entered by Silverman, Kudisch & O'Neil, for Delbert Blinn Co, a creditor.